



SKY'S RESPONSE TO OFCOM'S CONSULTATION ON QUALITY OF SERVICE AS PART OF ITS FIXED ACCESS MARKET REVIEW

Executive summary

This is the response by British Sky Broadcasting Group PLC ("Sky") to Ofcom's consultation on the quality of service delivered by BT Openreach, included as part of its wider consultation on "Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30" (the "FAMR Consultation")¹.

Proposals to regulate BT Openreach's service quality

It is plain that, as Ofcom acknowledges, Openreach has not been delivering an adequate quality of service for some time. Ofcom concludes that:

*"since the end of 2009, and particularly from the summer of 2010, Openreach's service performance deteriorated significantly, particularly with respect to the provision (i.e. installation) of new copper lines and fault repair."*²

Ofcom also notes the particularly serious deterioration in service quality levels during 2012.³

There has been a tendency to view this issue as a business-to-business issue – an issue between BT and other CPs – and to attempt to leave it to commercial negotiations to be resolved. Quality of service is not, however, a purely business-to-business issue. It affects thousands of end-users of UK broadband and telephony services on a daily basis, and gives rise to substantial consumer detriment – such as from having to go without important communications services, confirmed engineer appointments being missed, as well as experiencing frustration and hassle. The steps that Ofcom proposes in relation to addressing this situation are fully in accord with its primary statutory duty to further the interests of consumers.

In addition, poor Openreach service performance adversely impacts consumer switching among telecommunications providers and risks undermining Ofcom's efforts to bring about improvements to the switching process, which is a major Ofcom policy focus. Regulating Openreach service quality should be seen as a key part of Ofcom's work on facilitating easier switching for consumers.

¹ Ofcom consultation 'Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30', 3 July 2013. (http://stakeholders.ofcom.org.uk/binaries/consultations/fixed-access-market-reviews/annexes/FAMR_Consultation_annexes.pdf)

² FAMR Consultation, paragraph 9.12.

³ *Ibid.*

Accordingly, Sky welcomes and strongly supports Ofcom's proposal to regulate Openreach's quality of service in relation to MPF and WLR for the first time.

However, Sky has two significant concerns with Ofcom's proposed approach.

First, Ofcom proposes to adopt the service quality standards that are incorporated in existing service level agreements as the baseline for regulated standards of service. This is inappropriate. As Ofcom recognises, BT has a position of significant market power in the relevant services, which gives it substantial bargaining power in commercial negotiations. The service quality standards that CPs have been able to negotiate with BT, in the face of enormous resistance, comprise inadequate levels of service.

Ofcom should instead base regulated service quality levels on the levels of service that would be delivered by firms operating in competitive markets – the conceptual approach used when regulating other elements of BT's activities in which it has significant market power. As in the case of price controls, Ofcom should set a 'glide path' for minimum service quality levels, such that BT is required significantly to improve its quality of service delivery over the next three years. In particular, Ofcom should set a shorter target for lead-times for appointed engineer visits.

Second, Ofcom's analysis appears to include a presumption that requiring BT to deliver a better quality of service will necessarily come at increased cost, which would then be passed on (at least in part) to other CPs. Sky considers that such a presumption is inappropriate. Sky's own experience suggests that there are often significant opportunities for improving service quality through organisational and process efficiencies. We find it difficult to believe that there are not substantial opportunities for such efficiencies to be realised within Openreach. Sky appreciates that Ofcom is doing further work on this issue, and would encourage it to consider with great care claims by BT that improved service quality can only come at significantly higher cost.

It is plain that the proposed new service quality targets will achieve little if they are not backed by effective incentives for BT to deliver those standards. Above all, this will require Ofcom to signal clearly that it is prepared to fine BT if it fails to meet the targets, via clear guidance. Ofcom should also limit the ability for BT to evade the objective of the proposed regulation, and consider carefully other means by which BT can be incentivised to meet service quality targets.

Sky's other principal issues in relation to Ofcom's proposals concern their scope. Whilst Sky considers that it is right to limit the scope of the new regime, we also consider that it should apply to SMPF and GEA products, and to non-appointed provisioning for GEA.

The proposed new process for determining SLAs and SLGs

The quality of service delivered by Openreach in relation to a wide range of other services will continue to be governed by SLAs and SLGs which are determined via commercial negotiation. We welcome Ofcom's acknowledgement that the evidence it has reviewed as part of the FAMR Consultation demonstrates that the current process for reaching such agreements does not work effectively. Given Openreach's bargaining power, and demonstrated ability and willingness to game the system, it would be surprising if the process in fact worked effectively.

Ofcom's proposed new negotiation process, facilitated by the OTA and with a time limit of six months, should go a long way to address the problems with the current process, but there are still several deficiencies. At Section 4 we set out several proposals that we consider would improve the effectiveness of the process proposed by Ofcom. For example, we recommend that Ofcom issues guidance on the required characteristics of 'fit for purpose' SLAs and SLGs.

Improvements to Reference Offers and KPIs

Ofcom has proposed several other useful improvements to the SLA regime, notably (a) requiring BT to include a minimum set of SLA/SLGs in its Reference Offers, and (b) requiring BT to publish, and report against, a minimum set of KPIs in support of SLAs. Sky supports these proposals, and suggests a number of ways in which their effectiveness could be enhanced in Section 5 of this response.

The need for better SLAs and SLGs

Whilst Ofcom's proposals should result in significant improvements in the future, there is a pressing need for improvements to existing SLAs/SLGs, and the development of SLAs/SLGs for a range of services where none exist today. Accordingly, Sky considers that Ofcom should direct the OTA to address this situation as a matter of urgency.



SKY'S RESPONSE TO OFCOM'S CONSULTATION ON QUALITY OF SERVICE AS PART OF ITS FIXED ACCESS MARKET REVIEW

Introduction

Sky has advocated a thorough review of the issue of Openreach's quality of service for some time. Sky considers that the quality of service delivered by Openreach is inadequate, and that this is a significant consumer and competition issue. Accordingly, we welcome Ofcom's examination of this issue in the FAMR Consultation, and the proposals to address the problems that it has identified. Nevertheless, in some respects we consider that Ofcom's proposals are overly cautious, and will not deliver the benefits to consumers that Ofcom should be seeking. This submission puts forward a number of suggestions for improvements to Ofcom's proposals.

This submission comprises the following sections:

- **Section 1:** The quality of service delivered by Openreach is inadequate;
- **Section 2:** Inadequate Openreach service quality is a significant consumer and competition issue;
- **Section 3:** Ofcom's proposed new regulation;
- **Section 4:** The proposed new process for developing SLAs and SLGs;
- **Section 5:** Further improvements to Reference Offers and KPIs; and
- **Section 6:** The immediate need for improved and new SLA/SLGs.

1. The quality of service delivered by Openreach is inadequate

- 1.1 Poor quality service is one of the well-known potential detriments associated with significant market power. As the owner of a long-lived natural monopoly infrastructure asset, Openreach has a very high degree of market power. This means that it does not face the normal pressures faced by firms operating in competitive markets to strive to understand and meet the demands of its customers.
- 1.2 The adverse effects of market power on incentives to provide services of a reasonable standard are exacerbated in this case by the particular form of regulation faced by Openreach – RPI-X price control without service quality regulation – which provides incentives to reduce service quality. This risk has long been recognised in utility regulation. For example, Sappington (2002) states:

“A...potential drawback to incentive regulation stems from the strong incentives it can provide to reduce operating costs. One common way to reduce operating costs is to reduce service quality. For example, a telecommunications supplier may reduce its repair and customer assistance staffs in order to limit the wages and benefits it pays to its employees. Such staff reductions can cause service quality to decline below historic levels. If historic levels of service quality do not exceed ideal levels, then the resulting decline in service quality under incentive regulation can reduce welfare. (Liston, 1993)...**Although price cap regulation plans typically focus on regulating service prices, they also commonly regulate service quality.** Service quality regulation is often thought to be particularly important under price cap regulation because the enhanced incentives for cost reduction that price caps provide can render certain reductions in service quality particularly profitable.”⁴ (Emphasis added.)

- 1.3 For this reason, regulation of service quality normally goes hand-in-hand with the determination of price controls in regulated industries.
- 1.4 Such direct regulation does not exist in relation to the products delivered by Openreach. It was considered unnecessary as it was expected that Equivalence of Input requirements, put in place at the same time as the formation of Openreach, would provide sufficient incentives for it to deliver adequate service levels to third parties. Experience has shown, however, that this expectation was not well founded.⁵ As a result, telecommunications is the only utility in the UK in which quality of service is not regulated alongside prices.
- 1.5 This has left competing communications providers purchasing essential inputs from Openreach reliant on commercial negotiation to attempt to ensure adequate levels of service quality and compensation when service quality falls short of such levels. Given the asymmetry in both information and bargaining power that exists, which stem from Openreach’s market power, this has resulted in protracted negotiation with inadequate outcomes for purchasers of Openreach services, and ongoing gaming by Openreach in relation to service quality⁶.
- 1.6 Above all, however, inadequate regulation of service quality has resulted in inadequate levels of service quality provision by Openreach, clearly documented by Ofcom in the FAMR Consultation. For the past few years Openreach has failed persistently to meet service quality targets that are themselves not challenging.
- 1.7 Sky welcomes Ofcom’s investigation of these issues, and its proposals to address them.

⁴ Sappington, D., “Price Regulation”, in M. Cave, S. Majumdar, and I. Vogelsang (eds.), *The Handbook of Telecommunications Economics. Volume I: Structure, Regulation, and Competition*: 225-293. Amsterdam: Elsevier Science Publishers. The referenced article is C. Liston, 1993, ‘Price-cap versus rate-of-return regulation, *Journal of Regulatory Economics*, 5, 25-48.

Indeed, the need for service quality regulation in telecommunications was recognised at an early stage by the inventor of RPI-X price controls, Professor Stephen Littlechild. In the context of potential ways of regulating BT after privatisation, he wrote: “it would seem sensible to ensure that quality of service did not deteriorate as a result of the tariff reduction scheme”. (Page 35 of *Regulation of British Telecommunications’ Profitability*, London: HMSO, 1983.)

⁵ One reason for this is that BT Retail and competing CPs differ in the extent to which they purchase inputs from Openreach. Ofcom documents the fact that BT’s focus on driving high speed broadband products – which are more profitable for BT to supply to consumers than for other CPs – has resulted in a shift of resources within Openreach to servicing these products, at the expense of those relied upon by competing CPs. (See FAMR Consultation, paragraph A10.106.)

⁶ Sky considers that Openreach’s behaviour in relation to the non-payment of SLGs during 2012, which resulted in both TalkTalk and Sky having to raise disputes with Ofcom, is a prime example of such gaming.

- 1.8 The detailed work that Ofcom has undertaken, set out at Annexes 9 and 10 of the FAMR Consultation, shows that there is a fundamental problem in the UK telecommunications industry associated with Openreach's quality of service. In particular, Ofcom's research shows the deterioration over time in service quality in relation to both installations and fault repairs for the 'legacy products', WLR and MPF, relied upon by millions of UK consumers. As Ofcom states:

*"since the end of 2009, and particularly from the summer of 2010, Openreach's service performance deteriorated significantly, particularly with respect to the provision (i.e. installation) of new copper lines and fault repair. While service levels have fluctuated over time, the evidence shows that service levels have been consistently lower since 2009 for both MPF and WLR. As noted above, 2012 saw major deterioration in service leading to industry pressure on Openreach to devote significantly more resources to this area. While our evidence shows that service levels have improved since the start of 2013, we remain concerned that given our provisional findings regarding BT's SMP in the affected markets, there are insufficient incentives for Openreach to maintain what we consider to be an appropriate standard of service quality."*⁷

- 1.9 It is plain, however, that this assessment may understate the extent of the problem. Ofcom's analysis essentially uses as the basis for a reasonable standard of service that which Openreach achieved at the end of 2009, before service quality began deteriorating markedly. Without fuller investigation, there is no way of knowing whether the quality of service delivered at the end of 2009 was reasonable. It may be the case, for example, that service quality has simply deteriorated, since the end of 2009, from a level that was already inadequate when compared to a reasonable benchmark.

2. Inadequate Openreach service quality is a significant consumer and competition issue

- 2.1 Sky welcomes and supports the analysis set out in Annex 9 of the FAMR Consultation of the impact of poor service quality. In particular, we strongly endorse Ofcom's statement that:

*"Ofcom's principal duty is to further the interests of consumers and citizens in relation to communications matters and these impacts are therefore of central importance in this review. Moreover, any negative impact that poor quality of service has on the consumer/business experience could then in turn be impacting competition within the sector by acting as a barrier to switching."*⁸

- 2.2 Due to the way in which quality of service issues have been dealt with in the past, there can be a tendency to regard this issue principally as a 'business-to-business' issue, i.e., a matter of dealings between Openreach and its wholesale customers, such as Sky and TalkTalk. It is imperative, however, continually to bear in mind the fact that it is UK consumers who bear the real burden of inadequate Openreach service provision.
- 2.3 It is therefore imperative that Ofcom ensures that its principal duty remains front of mind when considering solutions to this problem. In particular, as discussed further below, the interests of consumers must be Ofcom's principal focus when considering the setting of minimum quality of service standards.

⁷ FAMR Consultation, paragraph 9.12.

⁸ FAMR Consultation, paragraph A9.79.

- 2.4 Sky considers that both the evidence in the FAMR Consultation, and Sky's own experience, bear out the fact that UK consumers are suffering substantial detriment from inadequate Openreach service provision. By way of example, for Sky's customers⁹:
- LLU faults not being fixed in the agreed timescale of 'the next working day' for 35% of reported faults results in [CONFIDENTIAL] delayed repairs per month;
 - faults experienced by customers within the first month of having their line activated (referred to as 'early life failures' or 'ELF') affects around [CONFIDENTIAL] Sky customers per month;
 - new line orders not being confirmed within 4 days of the order being placed with Openreach, which means that the appointment date given to around [CONFIDENTIAL] Sky customers per month has to be reviewed by re-contacting the customer; and
 - confirmed engineer appointments being missed on average around [CONFIDENTIAL] of the time results in approximately [CONFIDENTIAL] missed appointments per month, a rate that far exceeds the target of 2%.
- 2.5 As Ofcom correctly observes, such problems give rise to substantial consumer detriment associated with loss of service¹⁰ and wasted time¹¹ (for example taking time off work to wait for an engineer that never arrives). To these, Sky would add the frustration and annoyance experienced by consumers who are faced with poor service.
- 2.6 It is, however, important not to lose sight of the fact that these detriments are in addition to the disbenefit to consumers from the potential gap between (i) the quality of service levels that Openreach aims to deliver today, and (ii) more demanding service quality standards that a firm operating in a competitive market would aim to deliver.
- 2.7 In previous inquiries Ofcom has sought to quantify the losses to consumers from inadequate service – or, equivalently, the potential gains to them from improved service levels.¹² Sky notes that, while this has not been done in this case, all available evidence suggests that, if such an exercise were undertaken, it would be likely to demonstrate large potential gains to consumers from improved Openreach service levels.
- 2.8 Sky considers that it is now clear that the adverse impact on thousands of UK consumers every day means that the issue of Openreach's service quality must be one of Ofcom's key policy priorities.

⁹ The calculation of the statistic relating to the impact on Sky customers is explained in Annex 4 (confidential).

¹⁰ Ofcom's Consumer Research (page 21) shows the importance of the availability of their landline and internet to consumers. About half (49%) of residential consumers said that they would "*struggle to function/ could manage but for a limited time period*" without their landline and nearly two thirds (64%) said the same about their internet connection. Naturally, SMEs claimed a much greater dependency of over 90% for either service.

¹¹ FAMR Consultation, paragraph A9.82.

¹² See, for example, the estimates of the benefits of faster mobile number portability in 'Changes to the mobile number porting process, Final Statement', July 2010.

Impact on consumer switching and competition

2.9 Improving consumers' ability to switch supplier is already a key policy focus for Ofcom. For example, Ofcom's current Annual Plan states "*Ensuring efficient switching, and removing switching barriers, will continue to be a priority for Ofcom*"¹³ while Ed Richards recently challenged Ofcom and industry to:

*"transform the switching experience in the consumer interest and to support a more competitive market; to remove the inconvenience, delays and uncertainty that currently can bedevil consumers when trying to change their provider."*¹⁴

2.10 It is plain that a substantial contributor to the "*inconvenience, delays and uncertainty that can currently bedevil consumers when trying to change their provider*" is poor Openreach service provision. The process of switching among operators providing services on the Openreach network is bedevilled by long waits for engineer visits to install new lines, missed appointments, and faults with lines soon after a switch.

2.11 Sky estimates that [CONFIDENTIAL] of those consumers who choose to switch to Sky require an Openreach engineer visit. This represents approximately [CONFIDENTIAL] customers on average per month. During 2010/11 daily average waiting times for an Openreach engineer to provision a new service extended out to 47 working days, with some customers waiting over two months before they could receive service. As Ofcom observes, matters have improved since then, but consumers must still currently wait for an average of over two weeks before a line is able to be installed.

2.12 Sky's own analysis into the impact of lead times on switching shows a number of adverse consequences. In particular:

- customers become frustrated and make numerous calls to Sky to check on the progress of their switch;
- customers' Net Promoter Score (which measures consumers' likelihood to recommend a product or service to friends or colleagues) falls steadily as lead times get longer; and
- customers cancel their switch – either on being told how long they must wait to switch (having originally placed an order, and therefore expressed a desire to switch), or during the switching process, as they give up waiting for the switch to happen.¹⁵

Long lead times are also commonly mentioned by customers as a source of dissatisfaction in their comments to Sky's joiner and home move surveys.

2.13 The delay being experienced by providers who rely upon Openreach is now being exploited by Virgin Media, which advertises the speed with which it can connect new customers.¹⁶ This places CPs reliant on Openreach at a competitive disadvantage.

2.14 In addition, approximately [CONFIDENTIAL] consumers per month who have switched to Sky are at present experiencing an unacceptably high rate of 'early life failure' where their

¹³ Paragraph 2.18 of Ofcom's 2013/14 Annual Plan.

¹⁴ 'Speech for Consumers and Citizens in the Communications Sector conference', September 16, 2013. See also: 'Consumer Switching – A statement and consultation on the processes for switching fixed voice and broadband providers on the Openreach Copper Network', Ofcom, 8 August 2013.

¹⁵ Sky presentation to Ofcom, 'Impact of Openreach lead-times on new Sky Broadband and Talk customers', 29 July 2013.

¹⁶ *Ibid.*

new service does not work when first provisioned. This causes consumers to take a dim view of the benefits from switching, and word of mouth dissemination of poor switching experiences can have a powerful impact on other consumers' view of the switching process.

2.15 As Ofcom observes, where all providers suffer the same poor service quality, this is likely to have a smaller impact on BT itself.¹⁷ Concerns about the disruption or delay in switching between operators are likely to result in a 'flight to brand' which benefits BT. The Ofcom consumer research¹⁸ ("Ofcom Consumer Research") illustrates this positive perception of BT as a 'safe brand' with:

- over a third (35%) of residential consumers agreeing 'strongly' or 'slightly' that 'you are less likely to have a problem with service installation or repair from BT than with competitors'; and
- around half (53%) agreeing 'strongly' or 'slightly' that 'if I had a bad experience, with a provider other than BT, with service installation or repairs I would consider switching to BT'.¹⁹

2.16 This is despite consumers' actual experience of BT's service. Consumers make nearly twice the number of complaints about BT's telephony service and over three times the number of complaints about BT's broadband services, compared to complaints about Sky's service.²⁰

3. Ofcom's proposed new regulation

3.1 In light of the significant problems that it has identified, Ofcom proposes to introduce a new minimum service performance SMP Condition.²¹ Ofcom notes that this is the first time it has sought to mandate specific minimum standards for quality of service in these markets.²² Sky welcomes and strongly supports Ofcom's proposal.

3.2 Nevertheless, Sky has a number of concerns about Ofcom's proposed approach, and recommendations for improvements in a number of areas. These are set out in the following sections:

- (a) setting minimum quality of service standards;
- (b) it is inappropriate to presume that improved quality of service will be likely to increase costs significantly;

¹⁷ Ofcom notes that in response to its Call for Inputs a number of CPs made the point that BT Retail benefits from poor service as consumers' default reliance is on a 'safe brand' (paragraph 9.5 of the FAMR Consultation). Ofcom considers its proposed publishing of "publicly accessible KPIs" will "potentially remove any misconception that BT Retail is a "safer" option" (paragraph 10.267 of the FAMR Consultation).

¹⁸ 'Ofcom Fixed Line Installation and Fault Repair, Summary Report', bdrcc continental, April 2013. (<http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/telecoms-market-data/fault-repair-research.pdf>)

¹⁹ Ofcom's Consumer Research, page 67.

²⁰ Ofcom's ninth quarterly report into telecoms and pay TV complaints between January and March 2013, published at <http://consumers.ofcom.org.uk/2013/06/latest-telecoms-and-pay-tv-complaints-figures-revealed-2/>.

²¹ FAMR Consultation, paragraph 10.317.

²² FAMR Consultation, paragraph 10.303.

- (c) incentivising Openreach to meet its regulatory obligations; and
- (d) other issues in relation to Ofcom’s proposed minimum service quality regulation.

3.3 Each of these issues is addressed below.

(a) Setting minimum quality of service standards

3.4 Whilst Ofcom proposes to set minimum quality of service standards for Openreach for the first time, it is proposing to adopt the service quality standards currently included in SLAs as the basis for those minima; Ofcom does not propose to seek to set more demanding standards. For example, in relation to installation lead times, Ofcom states:

*“...we are not minded at this time to propose regulatory intervention to reduce the lead time in the current SLA for provisioning appointments. We consider that the priority for this market review period is to ensure that Openreach is properly incentivised and resourced to meet its **existing obligations**.”²³ (Emphasis added.)*

3.5 This is profoundly disappointing. The adequacy of Openreach’s existing targets has never been subject to proper external scrutiny. Sky considers that they are inadequate, and reflect neither consumer expectations, nor what Openreach should be expected to deliver. Ofcom should be seeking to deliver real consumer benefits via the Service Quality Review, so that UK consumers receive best in class service delivery in relation to telecommunications services. This requires setting more demanding service quality targets.

3.6 The key reason put forward by Ofcom for this approach is as follows:

“We have based our condition on the [existing] SLAs as these are the best available measure of what the industry considers to be an appropriate standard.”²⁴

3.7 In the first instance, Sky considers that “*what the industry considers to be an appropriate standard*” is the wrong benchmark for determining the reasonableness of these targets. As discussed further below, Sky considers that the appropriate benchmark is the level of service quality that a firm operating in a competitive market could be expected to deliver, having due regard to consumers’ expectations.

3.8 Moreover, Ofcom’s assertion is without foundation, and contradicted by several statements elsewhere in the FAMR Consultation.

3.9 Sky considers that it is not credible to suggest that the targets in the existing SLAs are what the industry considers “*appropriate*”. Ofcom recognises that “*Openreach naturally holds, a more powerful negotiating position*”²⁵ as a result of its significant market power. In these circumstances it is implausible that the targets that industry has been able to persuade Openreach to agree to are those that industry considers to be appropriate.

3.10 In fact, CPs are on record demanding improved targets for many of the services and they have taken disputes to Ofcom seeking improvements of the SLAs achieved through the commercial negotiation process. Sky has sought for some time to establish the standard for Openreach appointed installations at five to seven days, the timeframe that Sky works

²³ FAMR Consultation, paragraph 10.52.

²⁴ FAMR Consultation, paragraph 10.309.

²⁵ FAMR Consultation, paragraph 10.166.

to for its own installations.²⁶ Such a standard has strong consumer support. In fact, as Ofcom observes, consumers would like lead times of three to five working days.²⁷

- 3.11 Sky considers that this target should be the focus of Ofcom's attention. We consider that Ofcom should give careful and thorough consideration to a proposal to reduce this target from its current level to five working days in stages over the market review period. Sky stands ready to provide all assistance required by Ofcom to review and understand the implications of such an improvement in the service provided by Openreach, which we consider would deliver significant benefits to consumers.
- 3.12 Ofcom's proposed approach is also at odds with the approach taken in Annex 9, which considers a variety of approaches for determining "*what constitutes a reasonable level of service*". These include (i) consumers' views, and (ii) comparisons with other European countries.
- 3.13 Instead of examining the core element of service quality targets²⁸, Ofcom proposes to focus on the frequency with which Openreach would be required to meet those targets. Ofcom proposes to increase the frequency with which Openreach would be required to meet the targets over the three year market review period. Whilst Sky welcomes and agrees with this approach, it must go hand-in-hand with proper scrutiny and improvements in the key targets themselves. Such targets should also include a "*glide path*" so that they deliver better quality of service to consumers by the end of the market review period.
- 3.14 By linking service quality targets to those currently included in SLAs Ofcom's proposal includes a natural 'ratchet', such that if targets are reduced via industry negotiation, they become the new standards for regulated quality of service. While Sky agrees with such an approach, this does not obviate the need properly to scrutinise the reasonableness of the targets currently included in SLAs. We consider that the regulated targets should be the lower of (a) those set by Ofcom, or (b) those included in SLAs, in the (unlikely) event that targets able to be negotiated by industry are more demanding than those set by Ofcom.

Analogy with setting charge controls

- 3.15 Sky considers that the task facing Ofcom in setting minimum quality of service standards is similar in nature to that of setting charge controls. It would be inconceivable to leave such controls to determination by BT, or negotiation between BT and other CPs, with Ofcom then simply adopting the charges that emerged from such a process, as these will reflect the exercise of BT's significant market power. Instead, Ofcom itself considers what levels charges should be set at, by reference to a concept of what a firm operating in an effectively competitive market would charge. Typically, such controls operate on the basis of BT being required to lower charges over a three year period, along a "*glide path*".
- 3.16 Sky considers that this is the most appropriate approach to Ofcom determining minimum quality of service standards. These should be based on a proper investigation of what a firm operating in an effectively competitive market could be expected to deliver. Ofcom should seek, in consumers' interests and to further competition, to set demanding service quality levels, with a tightening glide path over the three year market review period.

²⁶ See for example, email correspondence between Chris Stylianou, Sky and Rod Smith, OTA on 25 June 2012, and letter from Chris Stylianou, Sky to Liv Garfield, Openreach of 25 June 2012.

²⁷ FAMR Consultation, paragraph A9.132.

²⁸ By service quality targets we refer to the key performance measures such as 12 working days for installation lead times.

- 3.17 As with the setting of price controls, this is likely to require specialist input – for example on issues such as organisational efficiency, and the cost of changing processes within Openreach.
- 3.18 Such an approach does not involve Ofcom telling BT how to run its business. Investigation and setting of appropriate service quality targets by Ofcom does not mean that it would have any role in determining how BT should meet those targets. Once the targets are set, it is BT's choice as to how it meets them. Again, there is a clear analogy with charge controls. Although these are developed using detailed models of the costs of providing telecoms services, and include assumptions about (among other things) network configuration, this does not mean that BT is constrained to operate in accordance with such models. BT's only obligation is to ensure that its charges do not exceed the levels set by Ofcom, and Ofcom's role is to monitor and enforce BT's compliance with those controls.

Consumer expectations

- 3.19 In light of Ofcom's duty to further the interests of consumers, Sky considers that consumer expectations about service quality levels should play an important role in determining minimum quality of service standards – as appears to be recognised in Annex 9 of the FAMR Consultation.
- 3.20 Consumers have high expectations about the ability of firms to deliver high quality services within demanding timescales. Such expectations are likely to be conditioned by their experiences in other, highly competitive sectors – such as the ability to order groceries and other products online and have them delivered to their homes within a short period, often at a time of their choosing. Firms operating in such sectors are constantly searching for ways to improve their service to consumers, and benchmarking themselves against 'best in class' operators.
- 3.21 These consumer expectations are reflected in Ofcom's own consumer research. This research shows consistently that consumers expect better standards of service in relation to the provision of key telecommunications services than Openreach currently delivers and/or aims to deliver.
- 3.22 This gap is particularly stark in relation to waiting times for appointments for engineer visits to complete an installation. The current SLA target for such appointments is 13 working days (reducing to 12 working days by November 2013), and actual delivery is currently on average around that level.²⁹ Yet, as Ofcom concludes, its consumer research shows that:

“Taken at face value, this research indicates that satisfaction with installation service is likely to be maximised if timescales for consumer installations are around three to five working days and SME installations are around five to six working days.”³⁰

- 3.23 Accordingly, there is a substantial gap between consumers' expectations in relation to Openreach's delivery of installations, and both the SLA target and actual performance.
- 3.24 In relation to fault repairs, whilst consumer expectations, as indicated by Ofcom's research, are in line with SLA targets, at 1-2 days, the problem here lies with Openreach's performance in terms of the percentage of repairs that are actually completed within

²⁹ As noted above, and as observed by Ofcom, this performance represents a substantial recovery from extremely long waits for installations during 2011 and 2012. CPs are faced with the constant risk of such a deterioration re-emerging at any time in the future.

³⁰ FAMR Consultation, paragraph A9.132.

targeted timescales. As Ofcom notes: “in 2012 there was a marked decrease (to as low as 55%) in the number of repairs that were completed within the SLA”³¹.

(b) It is inappropriate to presume that improved quality of service will be likely to increase costs significantly

3.25 Ofcom’s consultation appears to include a presumption that, if Ofcom were to set more demanding standards than those included in SLAs today, this would be likely to involve additional – potentially significant – costs being incurred by Openreach, which would then need to be passed on (at least in part) to other CPs. For example, Ofcom states:

“Our proposal [to regulate a minimum service level] will also provide an opportunity to ensure Openreach is appropriately resourced in the proposed charge control to deliver a given service level. Therefore if it [Openreach] is to improve quality above existing levels...additional costs may need to be considered.”³²

3.26 Elsewhere, while inviting views on whether Ofcom should set more demanding service quality targets, Ofcom states more determinatively:

*“We would in this regard note that **it is likely that** any reduction [in installation lead times] would come at additional cost.”³³ (Emphasis added.)*

3.27 Whilst it is clearly the case that improved service quality may require additional costs to be incurred, Sky urges Ofcom to subject any such claims to rigorous scrutiny. It is difficult to believe that there are not significant opportunities for improvements to be made via organisational and process changes within Openreach that may be low cost to implement. This is likely to be an area of inquiry that requires specialist input, and we urge Ofcom to commission appropriate research in order properly to understand the scope for efficiency gains within Openreach that would enable it to provide faster and more reliable services to its customers.

3.28 We note also that in investigating this issue Ofcom proposes, in part, to rely on a model commissioned by Openreach from Ernst and Young (“EY”).³⁴ Sky has significant concerns with such an approach, as it appears that third parties will not be in a position to review and comment on this model.³⁵ In Sky’s view, it would be difficult for Ofcom to place a great deal of weight on the results of the EY model unless it has been subjected to adequate independent scrutiny.

³¹ FAMR Consultation, paragraph A9.136.

³² FAMR Consultation, paragraph 10.301.

³³ FAMR Consultation, paragraph 10.52.

³⁴ FAMR Consultation, paragraph 10.321.

³⁵ Sky considers that Ofcom should make as much of the model as possible available to stakeholders now for their familiarisation and review. If, for some reason, confidentiality concerns constrain the release of the complete model to all stakeholders, then we would recommend Ofcom establish a ‘confidentiality ring’, which would allow experts to understand and access the EY model. At the very least, Ofcom should provide the partial release of the model as it has done previously in relation to its proposal for cost modelling for LLU/WLR charge controls. (Ofcom published, for example, “empty” models showing the model calculation steps but with the key data removed and in addition a description of the key assumptions to be used when applying the model.)

(c) Incentivising Openreach to meet its regulatory obligations

- 3.29 It is plainly the case that incentivising Openreach to meet the proposed minimum quality of service standards will require an expectation on Openreach's part that there will be significant consequences from failing to do so.
- 3.30 As Ofcom notes, in order to incentivise BT to deliver an acceptable quality of service the provision of compensation to affected CPs is not sufficient; the prospect of enforcement action by Ofcom also is required. This has resulted in Ofcom proposing to introduce minimum service performance conditions which "*will render BT subject to potential sanctions*"³⁶ in the event of non-compliance. Whilst Sky notes that the penalty for a breach of a SMP condition can be a fine of up to 10% relevant turnover, Sky considers that Ofcom should provide clarity about its enforcement intentions as it must ensure that the proposed measures have a strong incentive effect. Sky considers that for such a threat to be credible and have the desired effect on BT's decisions and behaviour, the sanction needs to be a fine that is both: (i) sufficiently large; and (ii) administered with a high degree of certainty and predictability.
- 3.31 Sky recognises that Ofcom will need to assess each case on its own merits and that Ofcom cannot fetter its discretion in relation to the level of potential fines. Nevertheless, in keeping with other areas regulated by Ofcom, it is able to develop and articulate a clear policy on the circumstances in which fines would be levied, and the potential level of such fines. This could either be provided by revising its existing Penalty Guidelines³⁷ or providing such guidance as part of this Service Quality Review. Detailed guidelines on Ofcom's approach to assessing and quantifying the level of a fine and its timescale for imposing fines will strengthen the incentive effect of the sanction and provide greater clarity for both Openreach and CPs.
- 3.32 In developing guidance, Sky recommends that Ofcom should take into account the following basic principles:
- Extent to which targets are missed; Ofcom should adjust the level of fine according to the extent to which Openreach has failed to meet the service level commitments;
 - Duration of problems; if Openreach fails to meet the minimum service levels required over a long segment of the period, Ofcom should impose higher fines;
 - Aggravating factors: Ofcom should take into account Openreach's service performance more generally in determining the severity of the fine for a breach, as noted in its Penalty Guidelines; and
 - Frequency of breach: fines should be higher if Openreach repeatedly fails to meet the required service levels.
- 3.33 Sky considers that there is likely to be value in examining practice in relation to this issue in other regulated sectors. For example, Ofwat has a long history of regulating quality of service in the water and sewerage sectors in England and Wales, and has developed detailed policy statements and guidelines on determining the amount of any penalty for failing to meet quality standards.³⁸

³⁶ FAMR Consultation, paragraph 10.310.

³⁷ Ofcom Penalty Guidelines under section 392 of the Communications Act 2003, 13 June 2011. (<http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>)

³⁸ See 'Statement of policy with respect to financial penalties', Ofwat. (http://www.ofwat.gov.uk/regulating/enforcement/pap_pos_101124statementpenalties.pdf)

- 3.34 Ofcom should also set out in its guidance that it will follow a strict timetable for evaluating compliance with the service level requirements following the end of each period, and issuing of any penalties for non-compliance.

Minimising the scope for avoiding penalties

- 3.35 In order for the risk of penalties to incentivise better performance by Openreach, it is necessary that there should be little scope for Openreach to avoid such penalties if its performance has in fact been inadequate. Sky agrees with Ofcom's proposal to include an allowance for 'MBORCs'³⁹ in determining regulated quality of service standards, reliance on which might otherwise enable Openreach unreasonably to avoid penalties. However, it is essential that Ofcom be alert to other ways that Openreach might ensure that the proposed new regulation is ineffective in motivating changes in its performance.

- 3.36 We note that Ofcom proposes to have direction-making powers in relation to the proposed minimum standards for quality of service⁴⁰. Not only should Ofcom monitor Openreach's actual performance with a mind to considering whether a regulated performance measure may need to be adjusted, but it should also be prepared to revise the conditions of a target should this be deemed necessary to address tactical avoidance by issuing a direction.

Other ways of incentivising compliance

- 3.37 Sky also urges Ofcom to give careful consideration to other methods by which Openreach could be incentivised to meet minimum quality of service standards. One such option may be to require executive remuneration in Openreach to be linked to meeting these standards. This approach is followed, for example, in the rail industry where the remuneration of Network Rail executives is required to include components that are directly linked to service quality levels.⁴¹ Sky considers that such a measure could in principle play an important role in raising the quality of Openreach's service quality provision.

(d) Other issues in relation to Ofcom's proposed minimum service quality regulation

- 3.38 Sky considers that the range of services to which the new regulation is intended to apply should be broadened to include SMPF and GEA products, and the service of non-appointed provisioning for GEA should also be included. Furthermore, we consider that the definition of the provisioning completion service proposed by Ofcom could be improved, and the reporting timeframe shortened.
- 3.39 We discuss these issues further in the following sections.

³⁹ FAMR Consultation, paragraph 10.312.

⁴⁰ FAMR Consultation, paragraph 10.27.

⁴¹ See, for example, 'Network Rail Executive Director Management Incentive Plan (Annual & Long Term) Effective from 1 April 2012',

Available at:

<http://www.networkrail.co.uk/browse%20documents/regulatory%20documents/regulatory%20compliance%20and%20reporting/management%20incentive%20plan%20statement/mip%20statement%20effective%20april%202012.pdf>.

Extending the current proposals to SMPF and GEA products

- 3.40 Ofcom proposes to apply the regulated minimum service levels to three key services in relation to WLR and MPF and only “if it appears at future reviews that the remedies we propose [in this market review] are not successful ...to consider the extension of [Ofcom’s] proposals to other services.”⁴² Whilst Sky agrees that the scope of the proposed new regulation should be limited to the most important service and product combinations delivered by Openreach, we consider that there are good reasons also to include SMPF and GEA products in the scope of the new regulation.
- 3.41 Ofcom has proposed introducing regulated minimum service levels for just two products, MPF and WLR supplied within the Fixed Access market. CPs, however, including BT Retail, compete with each other in this market using MPF, SMPF and GEA. Failing to extend the proposed service quality measures to the other products within the Fixed Access market affords Openreach a large degree of flexibility to provide different levels of service quality across these products. If one product is delivered or repaired with greater accuracy or speed than another, this will likely be distortive and introduce undesirable competitive effects. Sky considers that regulated minimum service levels should be implemented for all products at the same time within the same market where BT has been found to have significant market power.

Including the service of non-appointed provisioning for GEA

- 3.42 Sky considers that, in the first instance, it is proportionate to focus the regulation of the minimum service level only on key services. However, the non-appointed provisioning of GEA, where the CP is using ‘wires only’ (GEA-wires-only) is a special case. Here, the Openreach engineer is not required to visit the customer’s premise (hence there being no need for an appointment) but is still required to visit the cabinet. This non-appointed provision, GEA-wires-only, should be included as a service with a minimum service quality level. Wires only delivery is a critical development and is essential to enable a smooth customer switching experience as it avoids the need for an Openreach engineer to visit the customer home. Sky also considers that it will be crucial to monitor the performance and parity of the GEA-wires-only service with the comparable appointed GEA provision service (“GEA fully appointed”) where the engineer visits the home, as GEA-wires-only provision will be used by CPs competing with BT Retail, whereas BT Retail will only use the GEA fully appointed provision service.
- 3.43 A GEA-wires-only non-appointed provision minimum service level should require Openreach to:
- (a) quote a maximum timescale for the provision of each product order type (based on the engineering activity required to deliver it); and
 - (b) implement an SLG whereby the CP is compensated for each day outside the SLA target the non-appointed order takes to deliver.

Improving the definition of the provisioning completion service

- 3.44 Ofcom notes that the “Complete the provision” service, for which a minimum service level is to be regulated, is similar to the “Right First Time” measure.⁴³ The Right First Time measure, as noted in footnote 327 of the FAMR Consultation, extends to the first 8 days beyond the Customer Completion Date (“CDD”) to ensure that only completions that do not lead to an ‘early life failure’ are considered complete. Sky considers that the measure should extend

⁴² FAMR Consultation paragraph 9.14.

⁴³ FAMR Consultation, paragraph 10.311 and footnote 327.

to 28 days beyond CDD to align with Openreach's own definition of what is considered an early life failure.

- 3.45 The CDD should also be specified to be the time when the CP is notified by Openreach that it has completed the order. For the CP and its customers, a provision is not complete until they have been informed that it is complete. Openreach is not consistent in informing the CP of order completion.

Shortening the reporting timeframe

- 3.46 Ofcom proposes that the performance against the minimum service levels be assessed every twelve months and that Openreach be required to report on its compliance to Ofcom within three months of the end of the assessment period.⁴⁴ Sky considers the three month period to be unduly long. It would be more appropriate if reporting for each of the minimum service levels was delivered within 30 days of the close of the assessment period. Openreach will have been reporting monthly against the required KPIs, so producing an annual performance assessment should be straightforward, requiring the addition of one month's data to that which will already have been collected.

4. The proposed new process for developing SLAs and SLGs

- 4.1 Given that Ofcom's proposed new regulation will apply to only a small set of products and service combinations, the quality of service provided by Openreach for a large range of products and services will continue to be determined by commercially negotiated SLAs and SLGs.
- 4.2 The FAMR Consultation accurately sets out the problems that have arisen, and which are ongoing, in relation to the negotiation of SLAs and SLGs between BT and other CPs. In particular, we agree with Ofcom's assessment at paragraph 10.169 as follows:

"Where all parties are negotiating from a broadly similar position of market power, we consider that commercial negotiation without the involvement of the industry regulator is the preferred method for reaching conclusions on the SLA/SLG terms. However, BT is the SMP provider for services in the fixed access markets and, therefore, Openreach naturally holds a more powerful negotiating position. The recent negotiations over a new SLA/SLG for appointed provisioning demonstrate how protracted (over 12 months) such discussions can become. In this instance negotiations failed to reach agreement and in the end required mediation OTA2 and Ofcom. The lack of clarity and agreement relating to those discussions contributed in part to the dispute between TalkTalk and BT referred to above, with the former asserting that BT had failed to provide access on fair and reasonable terms as a consequence."⁴⁵

- 4.3 Sky's experience supports this view. In Sky's experience, Openreach has every incentive to protract negotiations, agree to new targets extremely reluctantly (particularly if they are more demanding), and to seek to link agreement to any new service quality improvements to matters that it appreciates other CPs will disagree with or that are unreasonable. Other

⁴⁴ FAMR Consultation, proposed regulatory condition 12.3, page 213 Annex 11.

⁴⁵ As Ofcom is aware, Sky disagrees with the assertion that there was a lack of either clarity or agreement in relation to the outcome of the discussions referred to.

CPs usually have no choice but to accept the unfavourable terms as they have no alternative source of supply.⁴⁶

4.4 Accordingly, we welcome Ofcom's proposals aimed at improving this process.

4.5 Ofcom has proposed a new six month negotiation process facilitated by the OTA. Ofcom proposes a set of four principles which are outlined in Table 10.13 of the FAMR Consultation to provide a framework to guide negotiations. Sky considers that Principles 3 and 4 can be improved as follows:

- **Principle 3** should be modified to be more deterministic. Currently, it suggests that should negotiations not succeed within six months the OTA is invited to report to Ofcom "as to whether [Ofcom] should initiate a review". Sky considers the Principle should require the OTA to report, with the expectation that Ofcom will follow on the OTA's work with its own enforcement investigation, unless there are reasons for doing otherwise, which Ofcom will need objectively to justify. To leave the process so open to discretion invites gaming by Openreach;
- **Principle 4** should be expanded to set the time when a new SLA/SLG takes effect. Sky considers that SLAs should apply from either (i) the date their negotiation is successfully concluded, (ii) another date agreed within the negotiations, or (iii) backdated to the date that unsuccessful industry negotiations are referred to Ofcom for investigation or via a dispute. In whichever case, the SLA and accompanying SLG payments should be presumed to be in force before being enshrined in any contract between BT and CPs. Clearly, Openreach's incentives are to delay the introduction of a new or improved SLA and this has been its practice – as recognised by Ofcom.⁴⁷ It is this incentive that the proposed principle is designed to counter.

Ofcom suggests that backdating the SLA/SLG to the date that a failed negotiation is referred to it, may "risk distorting the negotiating process...and does not allow Openreach to respond to the SLA proposed"⁴⁸. Sky considers any "risk to the negotiating process" to be insignificant compared with Openreach's incentives to delay, and that, leaving aside the introduction of new technology or processes required by a new SLA/SLG, Openreach should be actively delivering against the quality of service proposed by a new SLA/SLG from the earliest opportunity.

Further principles to better guide the OTA's processes

4.6 Sky considers that, in addition to the four principles proposed by Ofcom, the following principles to guide the OTA's work should be included:

- (a) the OTA should operate under full transparency, including sharing with all parties the details of requests for information that it makes to any one party;

⁴⁶ Sky notes that Ofcom has suggested that CPs should accept "sub-optimal" terms and then bring a dispute rather than seeking to negotiate better terms with Openreach (see Case CW/01098/12/12: *Dispute between TalkTalk Telecom Group PLC and Openreach (a BT Group business) concerning whether Openreach offered MPF New Provide to TTG on fair and reasonable terms and conditions*, paragraphs 3.210 and 4.194 to 4.195). Sky does not consider this to be an appropriate or efficacious policy approach.

⁴⁷ FAMR Consultation, paragraph 10.166.

⁴⁸ FAMR Consultation, paragraph 10.170.

- (b) the OTA should be permitted to terminate the SLA negotiation process mid-way through Ofcom's proposed six month period if it considers negotiations have broken down;
- (c) the OTA, in working with all affected parties (Principle 1), should develop agreed protocols to include smaller CPs which do not permit minority interests to derail the legitimate issues of the majority;
- (d) in order to ensure full engagement by all parties, the OTA should set and make clear when it requests information, the time within which the party providing the information has to fulfil the information request;
- (e) a senior member of Ofcom attend the OTA facilitated negotiations as an observer. This will ensure Ofcom is across the matter under discussion generally, should the negotiation need to be referred to Ofcom, and it will also have the positive effect of encouraging all parties to engage in the most constructive manner. Webb Henderson's Phase 2 report, notes that attendance by the Belgium regulator during negotiations is seen by it as important in delivering effective SLAs expeditiously⁴⁹; and
- (f) Ofcom should explicitly spell out its objectives in investigating an unsuccessfully negotiated SLA/SLG referred to it, to take account of: (i) the outcomes of the OTA facilitated work; (ii) the contribution of all participants; and (iii) the contribution of participants to delays in negotiations.⁵⁰

4.7 Ofcom should also note that facilitating the development and agreement of SLA/SLGs would be a new role for the OTA which will require considerable time and effort on its part, and potentially new staff.

Ofcom guidance on a "fit for purpose" SLA/SLG

4.8 Sky considers that the changes to the SLA/SLG development process would work more effectively if Ofcom provided guidance on the requirements of a "fit for purpose" SLA/SLG.

4.9 Sky considers Ofcom should draw on both its 2008 Statement and Directions on Service Level Guarantees⁵¹ (the "SLG Directions") and Sky's paper *Regulating for Quality* provided to Ofcom in Sky's response to its call for inputs in developing its guidance. The guidance should, as a minimum, address the following issues:

- the desirability of considering the end-to-end process and all touch-points, including the Operational Support System, between supplier and customer in specifying an SLA;
- the need for accompanying KPIs to provide full transparency in relation to performance of the service;
- a list of the potential sources of cost and loss that contribute to fully liquidated damages as a basis for SLG compensation that is comparable to normal commercial contracts;

⁴⁹ Page 18, *Service Levels: Benchmarking study and analysis, Phase 2 Report*, Webb Henderson, July 2013. (Attached to this response.)

⁵⁰ FAMR Consultation, paragraph 10.173.

⁵¹ Ofcom, *Service level guarantees: incentivising performance: Statement and Directions*, 20 March 2008. (www.stakeholders.ofcom.org.uk/binaries/consultations/slg/statement/statement.pdf)

- the limited use of ‘Matters beyond Openreach’s reasonable control’ (MBORCs). Currently Openreach is free to declare an MBORC at its discretion. It provides little explanation or justification as to cause for the declaration and its impact is not challengeable or appealable. Ofcom is proposing to improve scrutiny of Openreach’s use of MBORCs through the publication of an obligatory KPI.⁵² This is to be welcomed. However, the appropriate use of MBORCs needs to be:
 - restricted to more closely prescribed circumstances;
 - fully explained and justified at the time of declaration with evidence where available; and
 - open to dispute referral to Ofcom
- the appropriateness for the supplier proactively to make SLG payments (without the customer being required to make a claim) and to provide a clear and auditable explanation of their calculation in support of an SLG payment; and
- the linking of forecasts to achieving agreed performance and payment of SLGs. This issue is discussed further below.

Forecasting

- 4.10 The most recently agreed SLA with Openreach, the Appointed Leadtime SLA, makes payment of SLGs (in the event of Openreach failing to meet service quality standards) to larger CPs conditional on them providing Openreach with order forecasts that are required to have a very high degree of accuracy.⁵³
- 4.11 Sky and other CPs are concerned that such forecasts are demanded by Openreach purely as a mechanism for reducing SLG payments. This view is supported by:
- (i) Openreach’s insistence as to the granularity and accuracy of the forecasts. In terms of granularity, Openreach insists on highly granular forecasts of orders for each of its 26 field management regions. In terms of accuracy, an 85% forecast accuracy figure was adopted for the first year increasing to 90% thereafter.⁵⁴ This is far higher than what Sky understands to be typical ‘best in class’ forecast accuracy in other contexts⁵⁵; and
 - (ii) Despite repeated requests from Sky, there is no evidence, that forecasts provided by CPs are used by Openreach to improve its service performance. To date we have not been provided with any credible link between CPs’ forecast and Openreach

⁵² FAMR Consultation, paragraph 10.265.

⁵³ The appointment availability SLA requires the provision of forecasts by 26 regions. Given that Sky, and we presume other CPs, offer and forecast services nationally, the process followed is simply to use regional break-down information that Openreach provides to Sky to disaggregate national forecasts. It would be quicker and more efficient for Openreach simply to do this itself.

⁵⁴ Initially, Openreach sought to link the trigger for revoking the payment of SLGs to a difference between forecast and orders placed of 95%. Under pressure Openreach then revised this “forecast tolerance” downwards to 90% and in the SLA Compromise Agreement, concluded after 18 months of negotiations, set this figure at 85%, rising to 90%.

⁵⁵ For example, in relation to installations, a report by a leading operations and supply chain consultancy for Sky indicated that, for forecasts provided 3 months in advance, an average mean average percentage error (“MAPE”) – the most common and statistically viable form of measuring forecast error) – of 70.9% would be considered appropriate. For retailers such as Dixons, a MAPE for sales forecasts provided 3 months – 13 weeks in advance of 60-70% is considered reasonable.

operations. We fully expect that Openreach is best able to manage its operations based upon its own forecasts – given Openreach has a ‘whole of industry’ view.

- 4.12 The industry argued vigorously against the inclusion of a link between forecasts and payment of SLGs. Its inclusion in the SLA is a clear example of the weak negotiating position held by CPs.
- 4.13 In the SLG Directions, Ofcom concluded that *“it is not appropriate or proportionate to contractually link forecasting and compensation arrangements”*⁵⁶. Additionally Webb Henderson, in its review of SLA regimes across multiple jurisdictions, observed that the inclusion of forecasts which resulted in carve-outs appeared to have an *“adverse impact on performance and enforcement of the [SLA] regime”*⁵⁷.
- 4.14 Sky considers that Ofcom’s guidance on a fit for purpose SLA/SLG should adopt the position set out in its SLG Direction, with the Appointed Leadtime SLA being considered to be an exception.

5. Further improvements to Reference Offers and KPIs

- 5.1 Ofcom has proposed several other useful improvements to the SLA regime, including:
- BT including a minimum set of SLA/SLGs in its Reference Offers (“ROs”); and
 - BT publishing a minimum set of KPIs in support of the SLAs it is obliged to meet.
- 5.2 We discuss each of these further below.

BT including a minimum set of SLA/SLGs in its ROs

- 5.3 Ofcom proposes that *“BT must include SLAs and SLGs for specific services”*⁵⁸ in its ROs. These are detailed in SMP Condition 8 of the draft legal instruments included in Annex 11 of the FAMR Consultation. Sky supports this approach.
- 5.4 Sky considers that Ofcom has correctly identified the ROs of WLR, MPF, SMPF and VULA (GEA) as requiring specific SLA/SLGs. Ofcom has proposed that the required SLA/SLGs be *“based on the services for which BT already has SLAs and SLGs in place”*⁵⁹, with one addition for GEA. Sky agrees with the proposed approach and the need for the additional SLA for GEA appointed provisioning. However, Sky proposes a number of additional SLA/SLGs which need to be included in BT’s ROs. These are set out at Annex 1.
- 5.5 Additionally, Sky considers that it would be desirable if Ofcom published guidelines setting out its approach to requiring the specification of SLA/SLGs in ROs for new products. For example, in Sky’s response to the FAMR Consultation we propose that Ofcom should require BT to provide a new fibre based product, Unbundled Fibre to the Cabinet. This new product will require a RO and within that RO there needs to be a specific set of SLA/SLGs – none of which will have been set by negotiation between the industry and Openreach prior to the requirement for a RO.

⁵⁶ Page 13, SLG Directions.

⁵⁷ *Service Levels: Benchmarking study and analysis, Phase 1 Report*, Webb Henderson, July 2013. (Attached to this response.)

⁵⁸ FAMR Consultation, paragraph 10.159.

⁵⁹ FAMR Consultation, paragraph 10.160.

A minimum set of KPIs to be published by BT

- 5.6 Ofcom correctly recognises the importance of publishing KPIs to provide CPs with information on industry average performance. Not only is it important to have transparency around the quality of performance of a specific service, but it is equally important to be able to form an accurate picture of Openreach's overall performance and of its performance in servicing one product versus another. Being able to compare the quality of service for one product versus another is particularly important where different CPs compete in the same market with different products, e.g. MPF vs. GEA, and where BT's downstream businesses use different wholesale inputs to other CPs, e.g. WLR/SMPF vs. MPF.
- 5.7 Ofcom has detailed the KPIs it proposes to oblige BT to make available to the industry in Annex 11 of the Consultation.⁶⁰ We propose that a number of additional KPIs should be added, which are set out at Annex 2.
- 5.8 Ofcom proposes that BT "*publish a smaller set of KPIs intended to provide transparency for consumers*"⁶¹, detailed in Table 10.22 of the FAMR Consultation. Sky considers this to be an important proposal; Openreach's quality of service performance needs to be given the same public prominence that Ofcom affords other consumer quality measures, such as broadband speed⁶² and consumer complaints data⁶³. However, the set of KPIs is incomplete as it is proposed to apply only to WLR and MPF. The same set of KPIs proposed in Table 10.22 need to be expanded to include SMPF and VULA (or GEA).
- 5.9 We note also that Ofcom proposes that these 'publicly accessible KPIs' be published on the OTA2 website with links to them from the Ofcom website⁶⁴. Sky supports this proposal, but in accordance with our view as to the importance that should be afforded the publishing of these KPIs, we consider that Ofcom should accompany their publication with Ofcom comment and a press release in order to draw the public's attention to them – just as it does, for example, with the publication of information on broadband speeds.

6. The immediate need for improved and new SLA/SLGs

- 6.1 The current SLA regime is deficient in both the quality of existing SLA/SLGs and the absence of other necessary SLA/SLGs. There is a pressing need to improve both the quality of current SLA/SLGs and to put in place SLA/SLGs where they are missing. This work need not wait until the conclusion of the FAMR Consultation. Sky considers Ofcom should direct the OTA to commence a program of developing a priority list of SLA/SLG improvements necessary to ensure consumers receive the service they require and that they and their CPs have paid for.
- 6.2 Webb Henderson, in its review of SLA/SLG regimes globally, noted:

⁶⁰ FAMR Consultation Annexes, pages 249 – 280.

⁶¹ FAMR Consultation, paragraph 10.266.

⁶² *UK fixed-line broadband performance, May 2013 - The performance of fixed-line broadband provided to UK residential consumers*, Ofcom, 7 August 2013.
(<http://media.ofcom.org.uk/2013/08/07/average-uk-broadband-speed-continues-to-rise/>)

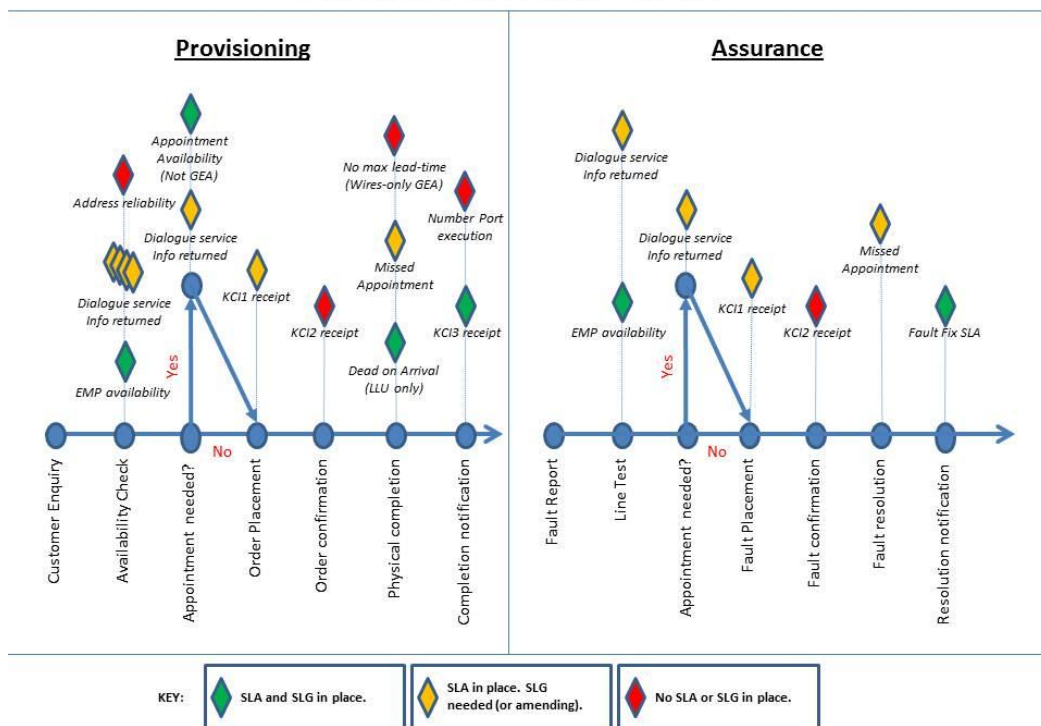
⁶³ *Telecoms and Pay TV Complaints Q1 (January – March) 2013*, Ofcom, 25 June 2013
(<http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/complaints/q1-jan-mar-2013/>)

⁶⁴ FAMR Consultation, paragraph 10.270.

“In order to be effective, SLA and SLG regimes should be deployed across the whole of the order and service journey – just as they would in a competitive market place and a commercially negotiated contract environment – to ensure clarity of obligations and rights on both sides and what is expected of both parties.”⁶⁵

- 6.3 Sky has reviewed the various ‘service journeys’ that our customers take (see diagrams below) and identified the Sky/Openreach interactions where SLA/SLGs should exist and are either missing or need improving. These are detailed in the tables of Annex 3.
- 6.4 The new initiatives Ofcom has proposed in the FAMR Consultation will be key to embedding an appropriate quality of service into the regulated remedies imposed on BT as an SMP provider. However, without also requiring Openreach and CPs to immediately turn their attention to the task of identifying and addressing inappropriate or missing SLA/SLGs, the industry and consumers will continue to be poorly served.

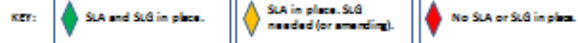
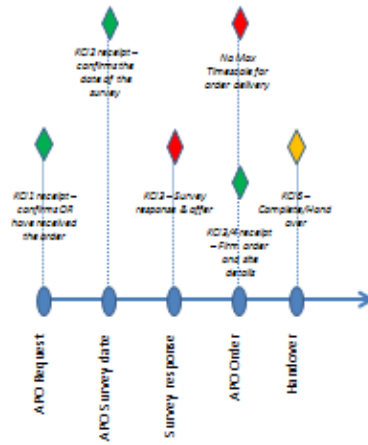
SLA and SLGs for WLR, LLU and GEA



65

SLA and SLGs for LLU Point of Presence Establishment

Provisioning – new exchange build / amending existing exchanges



- 6.5 We recognise that other CPs, particularly those operating in different markets, will have their own view as to the gaps that urgently need to be addressed, and we would welcome the opportunity to collaborate with them and the OTA in developing a prioritised program of work.

Sky

September 2013

Annex 1

Additional SLA/SLGs which need to be included in BT's ROs

- (a) MPF (SMP Condition 8.2C)
 - Maximum timescale for KCI2 receipt to be returned
 - Missed appointment SLG should match the level of the Openreach Abortive Visit Charge
 - Number Porting should be completed within 4 hours
- (b) SMPF (SMP Condition 8.2D)
 - Maximum timescale for KCI2 receipt to be returned
- (c) VULA (SMP Condition 8.2E)
 - Non-appointed provisioning SLA (i.e. maximum time scales for wires-only orders)
 - Maximum timescale for KCI2 receipt to be returned
 - Service working at completion of provisioning process
 - Missed appointment SLG should match the level of the Openreach Abortive Visit Charge
- (d) WLR (SMP Condition 8.2F)
 - Maximum timescale for KCI2 receipt to be returned
 - Line working at completion of provisioning process
 - Missed appointment SLG should match the level of the Openreach Abortive Visit Charge
 - Number Porting should be completed within 4 hours

Annex2

Proposed additional KPIs

Additional KPI requirements (End-user orders)

Products	Area	Description of measure	Relevant SLA
LLU, WLR, GEA	Provisioning	Percentage of orders where Openreach's CCD matches the CRD provided by the CP. This KPI should be broken down by product and order type (e.g. engineer appointed Provide, Restart, Migration)	N/A
LLU, WLR, GEA	Provisioning	Percentage of non-appointed orders delivered to CCD. <i>Note: the consultation suggests this metric for "Appointed" and "all" orders - we also wish to see it for "Non-appointed".</i>	Provision SLA - present for all products
LLU, WLR, GEA	Provisioning	Percentage of orders reported as Dead on Arrival (i.e. the service was delivered in a non-operational state)	Provision SLA - present for LLU only (currently)
LLU, WLR, GEA	Provisioning	Average installation lead-time for non-appointed orders. This KPI should be broken down by product and order type (e.g. restart, migration, working line takeover)	N/A
LLU, WLR, GEA	Provisioning	Percentage of orders that receive the KCI2 notification within 24 hours of the order being placed on Openreach. This KPI should be broken down by product and order type.	N/A
LLU, WLR, GEA	Provisioning and Assurance	Percentage of appointments that were missed. This KPI should be broken down by those reported as being missed by the end-user / missed by Openreach. The KPI should be able to be broken down by Provision / Assurance and product.	N/A
LLU, WLR, GEA	Assurance	Volume of faults placed. This KPI should be broken down by product and fault type (i.e. SIN349 breach, CDTA, SFI).	N/A

Additional KPI requirements (Point of Presence Establishment / Amendment)

Product	Area	Description of measure	Relevant SLA
LLU	Establishment + Amendment	Percentage of orders where Openreach's CCD matches the CRD provided by the CP.	Provision SLA (Plan + Build)
LLU	Establishment + Amendment	Percentage of (APO) survey results that are returned to the CP within 30 days.	N/A
LLU	Establishment + Amendment	Average lead-time for delivery of the new exchange / additional capacity (timescale measured from "firm order" to "handover").	N/A

Additional KPI requirements (EMP)

Products	Area	Description of measure	Relevant SLA
All	Response	The average response time for EMP to provide a response to a CP's enquiry. This KPI should be broken-down by each individual 'dialogue service'	All products

Annex 3

Review of current state of SLAs and SLGs: substandard and missing

Key

Green = OK, no immediate work required

Amber = some work required

Red = missing or major work required

Contract reference: Calls out the specific clause in the relevant Openreach supply contract for the product addressed in the table, listed at the bottom of each table.

LLU arrangements (end-user orders) and additional SLA requirements

Area of activity (Prov/ Repair/ EMP)	Description	SLA exist?	SLG exist?	Contract reference	SLA/SLG Status
Equivalence Management Platform (EMP)	Openreach must ensure that their systems are available to Communications providers (CPs) (in order to place orders / faults / enquiries).	Yes – see contract (complex equation)	Yes – see contract (complex equation)	Schedule 6, Clause 11.6	OK
EMP	Openreach provide a target timescale for responding to CPs’ Dialogue Service enquiries, 1 - Address Matching (Provision only) 2 – Manage Line Plant Availability (Provision only) 3 – Manage Line Characteristics (Provision only) 4 – Appointing availability (Provision and Assurance) 5 – Line Test Response (Assurance only)	Yes – see contract	No	Schedule 6, Clause 11.7	NEED SLG
Provision (step 1)	Openreach provide a target timescale for acknowledging CPs’ orders (KCI1)	Yes – 95% within 45 minutes, 98% within 60 minutes	No	Schedule 6, C - 11.7.2	OK
Provision (step 2)	Openreach provide a target timescale for confirming a delivery date for CPs’ orders (KCI2). This is the Contractual Commitment Date (CCD). A new SLG could be structured around a CP receiving the KCI2 within a given timescale <u>if the order is placed against a Gold Address Key (i.e. an address known to Openreach)</u>	Yes – 95% within 20 hours, 98% within 24 hours	No	Schedule 6, Clause 11.7.2	NEED SLG

Area of activity (Prov/ Repair/ EMP)	Description	SLA exist?	SLG exist?	Contract reference	SLA/SLG Status
Provision (step 3)	Openreach must offer a Provision appointment to a CP within 13 working days of the enquiry date [<i>note: only relevant for MPF orders</i>]. This is subject to a forecasting accuracy obligation (which needs to be removed).	Yes - 100% of appointments offered within SLA	Yes - £2 per day outside SLA <4 days, £4 per day if outside SLA >3.	Schedule 6, Clause 10.3	NEED IMPROVED SLA/SLG
Provision (step 4)	Openreach must Provision the end-user service on the CCD	Yes - 100% of provisions provided on CCD	Yes - £8 per working day later than CCD	Schedule 6, Clause 9.2	OK
Provision (step 5)	Openreach must Provision the service in a working state	Yes - 100% of provisions provided in a working state	Yes - £16 per working day later than CCD	Schedule 6, Clause 9.5	OK
Provision and Repair	Openreach must attend the customer's site on the agreed date and within the agreed timeslot (appointed orders / faults only)	Yes - 100% of appointments on the agreed day and time	Yes - £45 to CP or £90 to Openreach per event, dependent on party at fault	Schedule 6, Clause 6.3	NEED PARITY
In-life	Openreach must not disconnect a service in error	No	No	N/A	NEED SLA/SLG
Repair	Openreach must resolve the fault within the associated Care Level 2 (note: for Sky this is "end of next working day"). Note - there are 4 Care Levels offered by Openreach - Sky just takes the 'default level'	Yes - 100% of faults resolved within Care Level	Yes - 1 month rental per working day outside of SLA	Schedule 6, Clause 3.2.1	OK

Relevant contract - Openreach Access Network Facilities Agreement

WLR arrangements and additional SLA requirements

Area of activity (Prov/ Repair/ EMP)	Description	SLA exist?	SLG exist?	Contract reference	SLA/SLG Status
EMP	Openreach must ensure that their systems are available to CPs (in order to place orders / faults / enquiries).	Yes - see contract (complex equation)	Yes - see contract (complex equation)	Schedule 3, Clause 6	OK
EMP	Openreach provide a target timescale for responding to CPs' Dialogue Service enquiries. Relevant ones covered	Yes - see contract	No	Schedule 3, Clause 7	NEED SLG

Area of activity (Prov/ Repair/ EMP)	Description	SLA exist?	SLG exist?	Contract reference	SLA/SLG Status
	are: 1 - Address Matching (Provision only) 2 - Manage Line Plant Availability (Provision only) 3 - Manage Line Characteristics (Provision only) 4 - Number Port checker (Provision only) 5 - Appointing availability (Provision and Assurance) 6 - Line Test Response (Assurance only)				
Provision (step 1)	Openreach provide a target timescale for acknowledging CPs' orders (KCI1)	Yes - 99% of orders within 6 hours.	No	Schedule 3, Clause 2.1 (b)	OK
Provision (step 2)	Openreach provide a target timescale for confirming a delivery date for CPs' orders (KCI2). This is the Contractual Commitment Date (CCD). A new SLG could be structured around a CP receiving the KCI2 within a given timescale <u>if the order is placed against a Gold Address Key (i.e. an address known to Openreach)</u>	Yes - 99% within 6 hours of KCI1	No	Schedule 3, Clause 2.1 (c)	NEED SLG
Provision (step 3)	Openreach must offer a Provision appointment to a CP within 13 working days of the enquiry date (appointed orders only)	Yes - 100% of appointments offered within SLA	Yes - £2 per day if outside SLA <4 days, £4 per day if outside SLA >3.	Schedule 4	NEED IMPROVED SLA/SLG
Provision (step 4)	Openreach must Provision the end-user service on the CCD	Yes - 100% of orders on CCD	Yes - 1 month line rental per day	Schedule 3, Clause 4.1	OK
In-life	Openreach must not disconnect a service in error	Yes - no live service ceased in error	Yes - 1 month line rental per day until service is re-instated	Schedule 3, Clause 3.9	OK
Provision and Repair	Openreach must attend the customer's site on the agreed date and within the agreed timeslot (appointed orders and faults only).	Yes - 100% of appointments on the agreed day and time	Yes - £45 to CP or £90 to Openreach per event, dependent on party at fault	Schedule 3, Clause 4.6	NEED PARITY
Repair	Openreach must resolve the fault within the associated Care Level 1 (note: for Sky this is "end of next working	Yes - 100% of faults resolved within Care	Yes - 1 month line rental per day	Schedule 3, Clause 4.5	OK

Area of activity (Prov/ Repair/ EMP)	Description	SLA exist?	SLG exist?	Contract reference	SLA/SLG Status
	day + 1"). Note - there are 4 Care Levels offered by Openreach - Sky just takes the 'default level'	Level			

Relevant contract - Openreach WLR3 Contract

GEA arrangements and additional SLA requirements

Area of activity (Prov/ Repair/ EMP)	Description	SLA exist?	SLG exist?	Contract reference	SLA/SLG Status
EMP	Openreach must ensure that their systems are available to CPs (in order to place orders / faults / enquiries).	Yes - see contract (complex equation)	Yes - see contract (complex equation)	Schedule 4, Clause 7.1	OK
EMP	Openreach provide a target timescale for responding to CPs' Dialogue Service enquiries. 1 - Address Matching (Provision only) 2 - Manage Line Plant Availability (Provision only) 3 - Manage Line Characteristics (Provision only) 4 - Appointing availability (Provision and Assurance) 5 - Line Test Response (Assurance only)	Yes - see contract	No	Schedule 4, Clause 8	NEED SLG
Provision (step 1)	Openreach provide a target timescale for acknowledging CPs' orders (KCI1)	Yes - by 5pm the next working day	No	Schedule 4, Clause 2.1 (a)	OK
Provision (step 2)	Openreach provide a target timescale for confirming a delivery date for CPs' orders (KCI2). This is the Contractual Commitment Date (CCD)	Yes - no later than 5 working days after order is processed	No	Schedule 4, Clause 2.1 (b)	NEED SLG
Provision (step 3)	Openreach must Provision the end-user service on the CCD	Yes - 100% of orders on CCD	Yes - 10% of connection charge, per day	Schedule 4, Clause 2.1 (c)	OK
Provision (step 4 - appointed order)	Openreach must offer a Provision appointment to a CP within 13 working days of the enquiry date for an appointed GEA order.	No	No	-	NEED SLA/SLG
Provision (step 4 - non-appointed order)	Openreach must offer a maximum provisioning timescale for a non-appointed GEA order.	No	No	-	NEED SLA/SLG
In-life	Openreach must not disconnect a service in error	Yes - no live service	Yes - 1 month line	Schedule 4,	OK

Area of activity (Prov/ Repair/ EMP)	Description	SLA exist?	SLG exist?	Contract reference	SLA/SLG Status
		ceased in error	rental per day until service is re-instated	Clause 4.4	
Provision and Repair	Openreach must attend the customer's site on the agreed date and within the agreed timeslot (appointed orders and faults only).	Yes - 100% of appointments on the agreed day and time	Yes - £45 to CP or £90 to Openreach per event, dependent on party at fault	Schedule 4, Clause 3.1	NEED PARITY
Repair	Openreach must resolve the fault within the associated Care Level (note: for Sky this is "end of next working day").	Yes - 100% of faults resolved within Care Level	Yes - 1 month line rental per day	Schedule 4, Clause 2.3 (a)	OK

Relevant contract - Openreach GEA Contract

LLU arrangements: point of presence establishment/amendment and additional SLA requirements

Area of activity (Prov/ Repair/ EMP)	Description	SLA exist?	SLG exist?	Contract reference	SLA/SLG Status
APO receipt (step 1)	Openreach will confirm the receipt of an Advanced Planning Order (APO) from the CP within one working day.	No	No	-	OK
APO confirmation of survey date (step 2)	Openreach will confirm the date of the Exchange Survey to the CP.	No	No	-	NEED SLA
APO survey results and offer (step 3)	Openreach will confirm the exchange survey results and, if they are able to provide LLU service to the CP, an offer will be made. Openreach aim to return the survey / offer results within 30 days.	No	No	-	NEED SLA AND SLG
Firm order placed by CP (step 4)	The CP, accepting the offer made by Openreach, places an order for the delivery of the new exchange / amendment to the existing exchange. There is no maximum timescale offered by Openreach to provide the order.	No	No	-	NEED SLA AND SLG
Handover (step 5)	Openreach will hand-over the co-location request on the CCD - otherwise the CP can claim compensation.	Yes - Openreach will hand-over the	Yes - £80 per working day later	Schedule 6, Clause 4.2	NEED PRO-

Area of activity (Prov/ Repair/ EMP)	Description	SLA exist?	SLG exist?	Contract reference	SLA/SLG Status
	There are 2 amendments needed to this SLA: 1) That it is paid on a pro-active basis. 2) That it applies to "Upgrade" and "Modify" orders.	service on the CCD	than CCD		ACTIVE / OTHER ORDER TYPES

Additional opportunities for improvement

Issue	Description	Impact of poor service	Type of SLA/SLG
Resolution of 'blocked frames'	It can be the case that Openreach are unable to accept LLU orders within an exchange due to there being no frame capacity or (for MPF) no TAM capacity. There are no SLA arrangements in place dictating a maximum timescale relating to Openreach re-opening the exchange for new orders.	Commercial (CP is required to order more expensive services from BT)	Sky considers that, following an exchange being closed to new LLU orders due to blocked frames or lack of TAM capacity, Openreach should have a maximum timescale for resolving the issue – else compensation payments are made.
Quality of address data	Openreach's address database is crucial to a CP providing new service to a customer at the right premise and in the right timescale. CPs can experience issues when customer addresses / postcodes are not present on the Openreach database – this is especially an issue in relation to "new build sites".	Service cannot be provided to customer on LLU (note: WLR may be able to be provided)	Sky considers a SLA is required around Openreach's database being kept "in sync" with the Royal Mail PAF database (e.g Openreach will take daily / weekly updates from the PAF database and refresh their Address database within 24 hours of the new data being received).
Number Porting	Openreach provide no SLA / SLG around number porting – and their performance in this area is poor. An SLA/SLG is required in order to incentivise a service improvement.	Orders delayed and no inbound end-user calls	Sky considers a SLA/SLG is required to ensure Openreach adheres to the requirements within the NP Process Manual.
Billing accuracy	There is no SLA / SLG around Openreach persistently billing customers in error for engineering activity (i.e. Fault work done on behalf of Sky end-users) – consistently to Openreach's advantage. Sky needs to manually check each bill and disputes approx. 30% of the Engineering Event Charges.	Commercial (CP erroneously billed for charges and cost of billing analysts to review the bill)	There is no incentive on Openreach to improve billing accuracy. Sky considers an SLA/SLG on Openreach billing accuracy with compensation payment being made for inaccurate billing, falling short of a defined billing accuracy tolerance, is required.

Annex 4

[CONFIDENTIAL]